No. 88-1729

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

GEORGE RODRIGUEZ,
Petitioner,

v.

COPY

DANT OF ARIZONA, and Arizona corporation,
RUDY LOPEZ and JUDY LOPEZ,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

Atmore L. Baggot
Attorney at Law
5227 N. 7th Street, Suite 104
Phoenix, Arizona 85014-2807

(602) 279-7070
Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW:

1. WHETHER SERVICE BY PUBLICATION IS INEFFECTIVE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHERE NOTIFICATION BY MAIL TO A LAST KNOWN ADDRESS IS NOT ATTEMPTED AND IN FACT PLAINTIFF HAS IN ITS POSSESION A VALID CURRENT ADDRESS AND THE COUNTY RECORDS REVEAL A FORMER ADDRESS AT WHICH DEFENDANT WOULD HAVE RECEIVED CORRESPONDENCE.

TABLE OF CONTENTS:

Question Presented for Review.....i.

Table of Contents.....ii.

Table of Authorities.....iii.

Opinions Below and Statement

Of Jurisdiction.....2

Relevant Constitutional

and Statutory Provisions 2-8

Statement Of The Case.....9-15

Reasons For Granting the Petition:

PROPOSITION I:

1. SERVICE BY PUBLICATION IS INEFFECTIVE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHERE NOTIFICATION BY MAIL TO A LAST KNOWN ADDRESS IS NOT ATTEMPTED AND IN FACT PLAINTIFF HAS IN ITS POSSESION A VALID CURRENT ADDRESS AND THE COUNTY RECORDS REVEAL A FORMER ADDRESS AT WHICH DEFENDANT WOULD HAVE RECEIVED CORRESPONDENCE.15-30

Appendix A - Memorandum Decision of the Arizona Court of Appeals
dated 12/15/88.....A1 to A16

Appendix B - Order of Arizona Supreme Court Denying Review
dated 3/1/89.....B-1

Proof Of Service.....End

Table Of Authorities

CASES: Page

Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)...25

Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)...26

City of New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333 (1953).....23

Covey v. Town of Somers, 351 U.S. 141, 76 S.Ct. 724 (1956).....28

Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363 (1914)....18

Green v. Lindsay, 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982).20

Griffin v. Griffin, 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed. 865 (1946).....22

Memphis Light, Gas & Water Division v. Craft, 436 U.S.1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978).....22

Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983).....15,16,22,25

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).....16,21,26,27,30

Peralta v. Heights Medical Center, 108 S.Ct. 896 (1988).....25

Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279 (1962).....22,28

Tulsa Professional Collection Services, Inc. v. Pope, __ U.S. __, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988).....19

Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200 (1956).....27

Statutes:

ARS §42-393.....23
ARS §42-396(a).....23
ARS §42-421(A).....23
ARS §42-454.....25
ARS §42-461(A).....24
ARS §42-462(B).....24

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

No. _____

GEORGE RODRIGUEZ,
Petitioner,

v.

DANT OF ARIZONA, an Arizona corporation,
RUDY LOPEZ and JUDY LOPEZ
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

The petitioner, George Rodriguez, by and through his attorney, Atmore L. Baggot, asks that a Writ of Certiorari issue to review the judgment of the Arizona Court of Appeals in this matter.

OPINIONS BELOW AND STATEMENT OF JURISDICTION

The decision of the Arizona Court of Appeals from which the certiorari is sought was not reported but was entered on December 15, 1988. It is attached as Appendix "A". An Order denying Petition For Review was entered by the Arizona Supreme Court on March 1, 1989, and is attached as Appendix "B". The applicable statutory provision conferring jurisdiction on this Court is 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This matter concerns the Fourteenth Amendment to the Constitution which states:

United States Constitution.

Fourteenth Amendment: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside. No state shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Arizona Revised Statutes.

ARTICLE 8. JUDICIAL FORECLOSE OF RIGHT TO REDEEM.

ARS §42-451. Action to foreclose right to redeem; procedure.

At any time after the expiration of three years from the sale of a tax lien, if the lien is not redeemed, the purchasers, his heirs, or assigns, or the state if it is the assignee, may bring an action in a court of competent jurisdiction to foreclose the right to redeem. The provisions of law and rules of civil procedure relating to civil actions shall

control the proceedings, including the right of appeal.

Rule 4(e)(3), Arizona Rules Of Civil Procedure:

When the residence is known, the party shall on or before the date of the first publication mail a copy of the summons and complaint, postage prepaid, directed to the defendant at the defendant's place of abode...if the residency is unknown, the affidavit shall so state.

ARS §42-452. Judgment foreclosing right to redeem.

If the court in an action to foreclose the right to redeem finds the sale valid, and that the tax lien has not been redeemed, judgment shall be entered foreclosing the right of the defendant to redeem and commanding the county treasurer to execute and deliver forthwith to the party in whose favor judgment is entered.

including the state, a deed conveying the property described in the certificate of purchase. After entry of judgment the parties whose rights to redeem the tax lien are thereby foreclosed shall have no further right, title, or interest in the property, either in law or in equity, subject to the right of appeal and stay of execution as in other civil actions.

ARS §42-454. Redemption during pendency of action to foreclose.

At any time prior to entry of judgment foreclosing the right of redemption any person entitled to redeem under this article may redeem as in other cases, notwithstanding that an action has been commenced. However, if redemption is made by any person who has been served personally or by publication in the action, judgment shall be entered in favor of the plaintiff against such person for the costs incurred by the plaintiff, together with a

reasonable attorney fee to be determined by the court. When an action is brought by the state it shall be prosecuted by the county attorney, and the costs and attorney fees awarded shall be deposited in the county general fund.

ARTICLE 8.1. ADMINISTRATIVE FORECLOSE OF RIGHT OF REDEMPTION.

ARS §42-461. Application for treasurer's deed; fees and costs.

A. At any time after expiration of five years from the sale of a tax lien, if the lien is not redeemed, the purchaser or his assigns, including the state if it is the assignee, may instead of filing an action as provided by article 8 of this chapter apply for and receive a treasurer's dead to the property pursuant to this article.

B. The county treasurer, on demand of such purchaser, shall cause to be published in two consecutive weekly issues of the

official newspaper of the county a notice that the purchaser or his assigns has applied for a treasurer's deed, and that unless the property is redeemed before the date specified therein, a treasurer's deed will be executed and delivered to the purchaser or his assigns.

C. The purchaser or his assigns shall, at the time of applying for a treasurer's deed, pay to the county treasurer a fee of five dollars and the estimated costs of the title search, of publication of notice, of mailing notices by certified mail and of posting notice on the property, if applicable ....

ARS §42-462. Title search; notice of application for treasurer's deed.

A. Before delivering a treasurer's deed under this article the county treasurer shall cause a title search to be made sufficient to identify all parties with a legal or equitable interest in the

property recorded with the county recorder in the county where the property is located.

B. Not less than ninety days before the date of delivery of a treasurer's deed on a parcel of property, the county treasurer shall mail notice to the owner of the parcel as shown on the current tax roll and any other party identified in the title search conducted pursuant to section A as having a legal or equitable interest in the property. The notice shall be sent by certified mail, return receipt requested, to the person's last known address. The notice shall state that a treasurer's deed has been applied for, by whom it was applied for and a description of the property, the date the tax lien was sold and the last date for redeeming the property. ... .

STATEMENT OF THE CASE:

In 1952 Petitioner GEORGE RODRIGUEZ acquired a lot in Glendale, Arizona, which is legally described as Lot 18, La Casita Mia, at which time he was working in Phoenix for the Jackson and Perkins company. T.5. In March, 1968, he transferred to California and in 1972 he moved to 1026 Broadway, Wasco, California. T.9,10. He lived at that address with his present wife and son who is also named George Rodriguez.

On February 19, 1976, he moved to his present residence at 2234 North Third Street, Wasco, California, and resided there with his family including his son ofthe same name. T.20,25,26. In July of 1978 the son married and moved to the former family residence at 1026 Broadway in Wasco. T.61.

At approximately the time the son was getting married petitioner "was going to give him that (Glendale) lot so he would

build a house". Petitioner made arrangements for the son to pay the taxes. Petitioner received tax bills at 2234 Third Street in 1978, 1979, and 1980 and "gave them to my son so that he would pay them". T.36. However, "the taxes were confused because I trusted my son to pay them. My son did not pay them". T.31.

In 1979 the Maricopa County Treasurer struck off the lot for nonpayment of property taxes for 1979. On February 23, 1981, respondent DANT OF ARIZONA received a Certificate of Purchase from the Maricopa County Treasurer by paying the back taxes. However, petitioner continued to receive correspondence at the 2234 North Third Street address until 1986 from both the City of Glendale as well as from the Maricopa County Treasurer, notwithstanding the issuance of the Certificate Of Purchase to DANT. T. 8,10-12.

In 1984 attorney Robin W. Allen commenced an action in Maricopa County on

behalf of DANT to foreclose the redemption rights of the petitioner. In order to ascertain the location of the petitioner Mr. Allen went to the office of the Maricopa County Treasurer and discovered petitioner's former address at 1026 Broadway, Wasco, California. The record does not show why the Treasurer's records list the address on Broadway when Tax Statements were sent to the 2234 Third Street address. In order to confirm the Broadway address Mr. Allen called the telephone information operator in California and was informed that petitioner GEORGE RODRIGUEZ had a currently listed public telephone number but that the current address according to the telephonecompany was 2234 Third Street, Wasco, California, and not 1026 Broadway.

Relying upon the information provided by the telephone company Mr. Allen instructed the Kern County Sheriff's office to personally serve the defendants at 2234

Third Street in Wasco. The letter of instruction to the Sheriff is Exhibit 3 to the Deposition of Robin W. Allen (dated June 3, 1987) and states: "If the parties have moved and are not locatable locally, please so state by affidavit".

Deputy Sheriff Chris Edward Hill stated that he believed that a Hispanic female had answered the door at 2234 North Third Street on May 7, 1984, and stated that RODRIGUEZ had moved to Modesto. (Hill Depo., p.8-10). In fact, petitioner's son who had the same name as petitioner had recently moved to a town near Modesto. T.61.

No forwarding address was provided other than Modesto. The deputy wrote "Moved to Modesto" on his envelope and made no further efforts to located the defendant because "Modesto is not in Kern County". Hill Depo., p.11-13. If the deputy had not been advised that the supposed move was out of Kern county "I would have called the

phone company, maybe, for a new address, or checked the driver's license to see if they had a new address on it". (Hill Depo., p.13). Plaintiff did not make any inquiry of the Sheriff and consequently was unaware of the information provided to Sheriff Hill that the defendants had "moved to Modesto". No further efforts were made to located the defendants in Kern county or anywhere else in California. (Allen Depo., p.38-40). A further search of public records in Maricopa County revealed nothing. The only reason that further efforts were made in Maricopa County was because the defendants "had land here". (Allen Depo., p.39).

No efforts were made to investigate the address of record in the office of the Treasurer and Assessor, namely, 1026 Broadway, Wasco, California. That residence is still owned by petitioners and was rented to a close friend who "knows me for a long time" and "works for the same company where I work" and who would have

forwarded any mail or messages. T.9. In his Affidavit Re Circumstances Warranting Publication plaintiff's attorney stated:

> That he has been unable to ascertain the residence or whereabouts of the said defendants and that the same was and is unknown to him. The affiant has mailed, if any address was located, a letter with a copy of the Summons and Complaint, certified with restricted delivery and return receipt requested.

On January 29, 1985, Judgment foreclosing defendants' rights of redemption was entered by Commissioner William Topf. Not being aware of either the lawsuit or the entry of the judgment defendants-petitioner continued paying the

property taxes until 1986. T.13.

An appeal was timely taken by the petitioner RODRIGUEZ. The decisions of the state courts are attached in the appendix.

REASONS FOR GRANTING THE PETITION

I. SERVICE BY PUBLICATION IS INEFFECTIVE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHERE NOTIFICATION BY MAIL TO A LAST KNOWN ADDRESS IS NOT ATTEMPTED AND IN FACT PLAINTIFF HAS IN ITS POSSESION A VALID CURRENT ADDRESS AND THE COUNTY RECORDS REVEAL A FORMER ADDRESS AT WHICH DEFENDANT WOULD HAVE RECEIVED CORRESPONDENCE.

In this Court's decision in Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) it was held that the Due Process Clause requires that prior to the sale of an owner's property at a sale for delinquent taxes (which could have been later

redeemed by the owner) the owner was constitutionally entitled to actual notice. This Court squarely held:

> When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service...unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of Mullane.
>
> 103 S.Ct. at 2711.

The present case presents the next logical constitutional question which is suggested in Mennonite, supra, footnote 6 (103 S.Ct. at 2712) as to whether "before

the County Auditor executes and delivers a deed to the tax-sale purchaser, the mortgagee is constitutionally entitled to (actual) notice of its right to redeem the property". 103 S.Ct. at 2712.

The Arizona courts brushed aside this Court's decisions in Mennonite with the simple statement that "Allen did not know an address at which Rodriguez could receive mail". (Appendix A-13). Quite obviously, however, if Allen realized that he did have such a valid address personal service could have been accomplished. The basic reason why service by publication is permitted in any situation is because the plaintiff does not have a definite address. Further, in Mennonite this Court noted in footnote 4 (103 S.Ct. at 2711) that:

> Simply mailing a letter to 'Mennonite Board of Missions, Wayne County, Ohio' quite likely would

> have provided actual notice, given 'the well-known skill of postal officials and employees in making proper delivery of letters defectively addressed'. Grannis v. Ordean, 234 U.S. 385, 397-398, 34 S.Ct. 779, 784, 58 L.Ed. 1363 (1914).

This court should state the rule of constitutional law to be as outlined in the dissent by Judge Fidel in the Arizona Court Of Appeals:

> From the process server's return, Allen might reasonably haveconcluded that George Rodriguez had moved and left no forwarding address with the current Third Street occupant. Yet this

did not eliminate the ample possibility that the post office would forward Rodriguez's mail. Because the telephone operator had given the Third Street address as a current listing, Allen should have concluded that any move was recent. Under these circumstances, in my view, Allen could not properly rest on a failed service attempt; due diligence required the additional effort of service by mail to the last known address.

Appendix A-15,16.

Another recent "actual notice" decision is Tulsa Professional Collection Services, Inc. v. Pope, __ U.S. __, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) where this Court ruled that due process requires

actual notice to a claimant against a probate estate: "If petitioner's identity was known or "reasonably ascertainable," then termination of petitioner's claim without actual notice violated due process." 108 S.Ct. at 1348. Where "the legal proceedings themselves trigger the time bar ... due process is directly implicated and actual notice generally is required". 108 S.Ct. at 1346.

This Court also dealt with the issue of the use of the mails to provide notice in Green v. Lindsay, 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982) where the Court struck down a Kentucky statute allowing service by posting notice on an apartment door after only one attempt at personal service. The Court said:

> Notice by mail in the circumstances of this case would surely go a long way toward providing the

constitutionally required assurance...where personal service is ineffectual, notice by mail may reasonably be relied upon to provide interested parties with actual notice of judicial proceedings ... where an inexpensive and efficient mechanism such asmail service is available to enhance the reliability of an otherwise unreliable notice procedure, the State's continued exclusive reliance on an ineffective means of service is not notice reasonably calculated to reach those who could easily be informed by other means at hand." Mullane, supra, at 319, 70 S.Ct., at 659. 102 S.Ct. at 1881.

Even prior to Mennonite this Court in Griffin v. Griffin, 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed.8659 (1946) (attempted enforcement of money judgment against ex-husband) had stated in dicta that:

> ..notice by personal or substituted service ... cannot be dispensed with even in the case of judgment in rem with respect to property within the jurisdiction of the court.
>
> 66 S.Ct. at 560.

This Court has also held that the Due Process Clause requires actual notice for termination of utility service (Memphis Light, Gas & Water Division v. Craft, 436 U.S.1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978)), for condemnation proceedings (Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279, 9L.Ed.2d 255 (1962))

and for bankruptcy proceedings which start a specific time period for creditor's claims. (City of New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333 (1953)).

Under Arizona law when real property is offered for sale for delinquent taxes "it shall be sold to the person who pays therefore the whole amount of the taxes, interest, penalties and then due thereon, and who in addition offers to accept the lowest rate of interest upon the amount so paid in order to redeem the property from the sale which shall not exceed ten percent per annum from the date of sale until redeemed". A.R.S. §42-393. The low bidder then receives a Certificate Of Purchase which recites the amount due by the owner in order to redeem. A.R.S. §42-396(A). The owner may then redeem his property at any time before the delivery of a treasurer's deed to the purchaser. A.R.S. §42-421(A).

In order to perfect title to property acquired at a tax sale the purchaser has two options. One option is entitled "Administrative Foreclosure of the Right Of Redemption" and allows a purchaser to aministratively apply for and receive a treasurer's deed to the property instead of filing an action §42-461(A). Prior to delivery of the deed the County Treasurer is required to "mail notice to the owner of the parcel as shown on the current tax roll...by certified mail, return receipt requested, to the person's last known address". A.R.S. §42-462(B)

The second option is the alternative statutory method, which was elected in the present case, whereby the purchase "may bring an action in a court of competent jurisdiction to foreclose the right to redeem. The provisions of law and rules of civil procedure relating to civil actions shall control the proceedings,...". An owner may redeem his property "at any time

prior to entry of judgment ... notwithstanding that an action has been commenced". A.R.S.§42-454. However, after entry of judgment foreclosing the right to redeem the owner shall have "no further right, title, or interest in the property, either in law or in equity". A.R.S. §42-452.

It should be clear that if Mennonite, supra, requires actual notice of the purchase of the tax lien at very least the same notice should be required for the ultimate blow to the owner, namely, the total extinguishment of the last vestiges of his rights in his property.

This court has recently stated in Peralta v. Heights Medical Center, 108 S.Ct. 896 (1988)(no meretorious defense requirement for default judgment without actual notice) that the failure to give notice violates "the most rudimentary demands of due process of law", quoting Armstrong v. Manzo, 380 U.S. 545, 550, 85

S.Ct. 1187,1190, 14 L.Ed.2d 62 (1965). Deprivation of property without notice is "contrary to the most basic tenets of due process". 108 S.Ct. at 9.

This Court has also ruled on the due process requirements of service by publication in Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 113 (1971) where it said:

> ...service by publication...is the method of notice least calculated to brlng to a potential defendants' attention the pendency of judicial proceedings. See Mullane v. Central Hanover Bank and TrustCo., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). 91 S. Ct at 788.

The Mullane decision further stated that "process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it". 70 S.Ct. at 657. Regarding service by publication, this court approved publication only when "it is not reasonably possible or practicable to give more adequate warning . . . (and) employment of an indirect and probably futile means of notification is all that the situation permits". 70 S.Ct. at 658

In Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200 (1956) this court said "It is common knowledge that mere ne paper publication rarely informs a landowner of proceedings against his property." 77 S.Ct. at 202. "In too many instances notice by publication is no notice at all". 77 S.Ct. at 203. There, publication fell short of the requirement of due process because the name of the

landowner "was known to the City and was on the official records." "Even a letter would have apprised him that his property was about to be taken." 77 S.Ct. at 202.

In Covey v. Town of Somers, 351 U.S. 141, 76 S.Ct. 724 (1956) on facts very similar to the present case a landowner filed a motion to set aside a deed executed pursuant to Judgment of foreclosure of a tax lien. This Court held that even if notice is given in compliance with a statute that "the statute as applied was repugnant to the Fourteenth Amendment." 76 S.Ct. at 726

And, in Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279 (1962) the court said:

> The general rule that emerges from the Mullane case is that notice by publication is not enough

> with respect to a person whose name and address are known or very easily ascertainable and who legally protected interests are directly affected by the proceedings in question. "Where the names and post office address of those affected by a proceeding are at hand the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." 399 U.S. at 318, 70 S.Ct. at 659. 83 S.Ct. 2820.

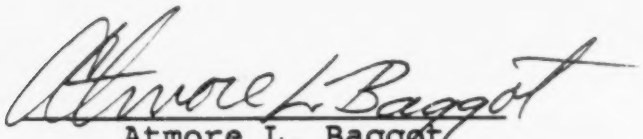
THEREFORE, petitioners were denied due process because their property was taken without notice and the default and resulting judgment must be set aside.

CONCLUSION:

Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. See Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950).

For the reasons stated, it is respectfully requested that the Petition For Writ Of Certiorari to the Arizona Court Of Appeals be granted.

DATED this 21st day of April, 1989.



Atmore L. Baggot
Attorney For Petitioner
5227 North 7th Street, Ste. 104
Phoenix, Arizona 85014-2807

(602) 279-7070

IN THE COURT OF APPEAL
STATE OF ARIZONA
DIVISION ONE

DANT OF ARIZONA, an Arizona corporation,
Plaintiff-Appellee,

RUDY LOPEZ and JUDY LOPEZ
Intervenors-Appellees,

v.

GEORGE RODRIGUEZ,
Defendant-Appellant.

No. 1 CA-CV 88-053

MEMORANDUM DECISION

AFFIRMED

EUBANK, Judge

We consider whether the trial court had jurisdiction over George Rodriguez ("Rodriguez"). Rodriguez argues that the service by publication by Dant of Arizona ("Dant"), pursuant to Rule 4(e)(3), Arizona Rules of Civil Procedure, was ineffective because his address was readily available and personal service could have been made on him.

BACKGROUND

In 1952, Rodriguez and his wife, Maria Rodriguez, purchased property in Glendale, Arizona. Until 1960, they lived on the property. Thereafter, the house on the property was torn down. In 1968, Maria Rodriguez died, Rodriguez married his present wife, Luz Rodriguez, and they moved to Wasco, California. From 1972 until 1976, Rodriguez lived at 1026 Broadway, Wasco, California. In 1976, Rodriguez moved to his present address at 2234 Third Street, Wasco, California.

Beginning in 1977, Rodriguez failed to pay property taxes on the Glendale property. In 1981, Dant paid the delinquent taxes in exchange for a Certificate of Purchase. In 1984, Dant sued to foreclose Rodriguez's right of redemption and to obtain a deed to the Glendale property.

Dant served its summons on Rodriguez by publication, stating in its affidavit

that after due search it was unable to locate Rodriguez. In January 1985, the trial court granted Dant judgment by default.

In October 1986, Rudy and Judy Lopez bought the Glendale property for $9,500. Within one year, they constructed a duplex on the Glendale property, which was then worth by their estimation between $65,000 and $70,000.

In April 1987, Rodriguez moved, under Rule 60(c), Arizona Rules of Civil Procedure, to declare Dant's judgement void for lack of jurisdiction, arguing that service by publication was ineffective. The trial court granted Rudy and Judy Lopez's motion to intervene.

The trial court held a hearing to consider Rodriguez's motion. Dant introduced evidence concerning the efforts of its attorney, Robin Allen ("Allen"), to serve Rodriguez directly. Allen searched the records of the Maricopa County

Assessor's and Treasurer's offices, which indicated that Rodriguez's address was 1026 Broadway in Wasco, California. Allen spoke to a telephone operator in Wasco, California, to confirm that Rodriguez resided at that address. He was told that Rodriguez was listed at 2234 Third Street in Wasco, California. Allen retained Chris Hill ("Hill"), who was a sergeant with the Kern County Sheriff's Department, to serve Rodriguez directly at the Third Street address. Allen requested that if Rodriguez and his first wife, Maria Rodriguez, had moved and were not locatable locally, then Hill should state that in his affidavit.

Hill testified that the woman who answered the door at the Third Street address seemed quite familiar with Rodriguez and his first wife, Maria Rodriguez. She told him that they had moved to Modesto, California, and that she could not provide a forwarding address or any other information. Hill stated that if

he had received a forwarding address, he would have listed it on his certificate. Hill returned the process, stating that Rodriguez and Maria Rodriguez had moved and their forwarding address was unknown.

Hill did not inform counsel that the Rodriguezs may have moved to Modesto.

Luz Rodriguez, Rodriguez's present wife, testified that she did not speak to Hill. However, she testified that at the time Hill attempted to serve Rodriguez, no one but she would have been at the Third Street address. She explained that Rodriguez's son, who was also named George, had moved to Huckson, a town near Modesto. Nevertheless she explained that if a Sheriff had asked after "George and Mary (sic) Macias Rodriguez" she would have known the sheriff was asking after her husband and his first wife, not her husband's son.

Allen then searched the local phone directories and the Arizona Motor Vehicle

Department records and concluded that Rodriguez had not moved back to Arizona. Thereafter, Allen served Rodriguez by publication.

The trial court denied Rodriguez's motion, finding that Allen exercised due diligence in attempting to serve Rodriguez directly before serving him by publication:

> THE COURT FINDS and ORDERS as follows:
>
> 1. On January 29, 1985, judgment was entered against Defendants Rodriguez based on service by publication. At the default hearing on that date, Commissioner Topf entered default judgment after hearing evidence and to locate Plaintiffs for personal service.
>
> 2. Plaintiff's counsel attempted to locate Defendants Rodriguez by reviewing records of Maricopa County Treasurer's and Assessor's Offices. Counsel hired the Kern County, California's Sheriff's Office to serve Defendants personally with a Summons and Complaint. The Sheriff's Office attempted to serve Defendants at 2234 Third Street, Wasco, California or anywhere within the Judicial District. Plaintiff's counsel was notified that the

attempted service was unsuccessful and the Summons and Complaint were returned with the indication that Defendants Rodriguez had moved, their forwarding address unknown. Plaintiff's attorney then checked the Motor Vehicle Department records in Maricopa County and local phone directories unsuccessfully.

3. The Court finds that Plaintiff's Counsel's efforts to locate Defendants Rodriguez were reasonable and all support a finding that due diligence was exercised in attempting to locate Defendants Rodriguez before serving them by publication.

DISCUSSION

Rodriguez argues that Dant's service by publication was ineffective under Rule 4(e)(3) because his address was readily available. See e.g., Mervyn's, Inc. v. Superior Court, 144 Ariz. 297, 300 n.4, 697 P.2d 690, 693 n.4 (1985) ("Notice by publication is permitted in quasi in rem and in rem proceedings where the party's address is unknown"); Omega II Inv. Co. v. McLeod, 153 Ariz. 231, 342, 736, P.2d 824, 825 (App. 1987) (Plaintiff did not show

due diligence when it only reviewed Casa Grande City directory and area telephone company records, and not the Pinal County Recorder's records which listed defendant's Michigan address); see also Donel, Inc. v. Badalian, 87 Cal. App. 3d 327, 333-34, 150 Cal. Rptr. 855, 859 (1978) (plaintiff did not show due diligence when he only reviewed telephone directories and he did not even ask defendant's attorney with whom he had extensive correspondence); Emanuel v. Fellows, 47 N.C. App. 340, 267 S.E.2d. 368, 371 (1980) (plaintiff showed due diligence when, upon learning that personal service was unsuccessful, he called the number listed as defendant's telephone number and he called the directory assistance operator); Miller v. Wenexco, Inc., 743 p.2d 152, 156 (Okla. 1987) ("Primary sources at hand, such as local tax rolls, deed records, judicial records and other official records, as

well as available secondary sources, such as telephone directory, a city directory or the like must be exhausted"). Rodriguez suggests that Allen could have contacted the telephone information operator in Modesto. However, there is no evidence that counsel was aware that the Rodriguezs might be in Modesto. Rodriguez also suggests that Allen could have made additional inquiries, based on the apparent conflict between the telephone operator in Wasco, who listed Rodriguez at the Third Street address, and Hill's affidavit, which stated that Rodriguez's address was unknown.

It is possible that if Allen had followed all of Rodriguez's suggestions, he might have been able to serve Rodriguez directly. However, Allen was not required to do "extensive detective work into the whereabouts of strangers." Preston v. Denkins, 94 Ariz. 214, 223, 382 P.2d 686, 692 (1963). Nor is there a formula or

checklist that constitutes due diligence. See Donel, 87 Cal. App. 3d at 329, 150 Cal. Rptr. at 856; Emanuel, 267 S.E.2d at 372. We conclude that Dant exercised due diligence in attempting direct service: Allen found Rodriguez's Third Street address by reviewing telephone directories, Department of Motor Vehicle records, and County Treasurer's and Assessor's records and by speaking to a telephone operator in Wasco, California; and Allen attempted direct service at that address.

Rodriguez argues that the facts in this case are very similar to the facts in Covey v. Town of Somers, 351 U.S. 141, 76 S. Ct. 724, 100 L.Ed. 1021 (1956). There is no similarity. In Covey, the plaintiff gave notice to the defendant by mail and by posting, although it knew that defendant was incompetent. The Supreme Court stated that the notice was merely a gesture and violated the Due Process

Clause of the Fourteenth Amendment. 351 U.S. at 146-47, 76 S.Ct. at 727, 100 L.Ed. at 1026. The Supreme Court did not state that service by publication in other circumstances would violate due process.

Rodriguez argues that Allen should have made more than one attempt at personal service, based on Duron v. Fleischman, 156 Ariz. 189, 751 P.2d 39 (App. 1988). In Duron, the defendant upon arrest gave as his address a post office box outside Pima County. 156 Ariz. at 190, 751 P.2d at 40. The Pima County Sheriff was unable to effect direct service at that address either because the sheriff did not have authority to serve process outside Pima County or because the address was a post office box. Id. The defendant offered proof that he could have been notified either through his counsel of record or by mail sent to his post office box. 156 Ariz. at 192, 751 P.2d at 42. The court held that the state had not

exercised due diligence in locating the defendant.

Rodriguez also argues that Allen should have asked Rodriguez's tenant who was staying at the Broadway address in Wasco, based on Lown v. Miranda, 34 Ariz. 32, 267 P.418 (1928). In Lown, the plaintiffs did not ask the tenants occupying the property which was the subject of the action about their landlord's address. 34 Ariz. at 37, 267 P. at 420. The court held that the plaintiffs did not show due diligence in locating defendant. Id.

We distinguish Duran and Lown. Allen was told by a Wasco telephone operator that Rodriguez's address was the Third Street address, not the Broadway address. Then he was told that Rodriguez had moved and his address was unknown. There was no evidence that, thereafter, Allen should have known that Rodriguez still lived at the Third Street address or that Rodriguez

still owned the house at the Broadway address.

Rodriguez also argues the Dant's service by publication was ineffective under the Due Process clause of the Fourteenth Amendment because Dant did not mail the summons to his Third Street address. See e.g., Tulsa Professional Collection Services, Inc. v. Pope, U.S. 108 S.Ct. 1340, 1347, 99 L.Ed.2d 565 (1988) (if an estate creditor's identity is known or reasonably ascertainable, notice by mail, not merely publication notice, was required); Mennonite Board of Missions v. Adams, 462 U.S. 791, 799, 103 S.Ct. 2706, 2711, 77 L.Ed.2d 180, 188 (1983) (mortgagees must be given notice of a pending tax sale by either personal service or mail notice, not merely by posting and publication); Greene v. Lindsey, 456 U.S. 444, 455-56, 102 S.Ct. 1874, 1880-81, 72 L.Ed.2d 249, 258-59 (1982) (statutory requirement permitting

notice by posting on the apartment doors of tenants in a public housing project after one attempt at personal service did not afford adequate notice when compared to the alternative of inexpensive, reasonably reliable mail notice).

We recognize that the Supreme Court has, in certain circumstances, concluded that mail service is an inexpensive, efficient mechanism reasonably calculated to provide actual notice, within the meaning of the Due Process Clause. Indeed Rule 4(e)(3) provides that if the defendant's residence is known, the plaintiff should mail a copy of the summons and complaint to the defendant at his residence. However, this authority does not apply to Dant's service. Allen did not know an address at which Rodriguez could receive mail.

CONCLUSION

We deny Dant's request for attorneys' fees on appeal because Dant has failed to indicate any statutory authorization for awarding such fees. Further, we deny Rodriguez's request for attorneys' fees in the trial court and on appeal. We affirm the trial court's order denying Rodriguez's request to declare the judgement void.

William E. Eubank, Judge

CONCURRING:

Fidel, Presiding Judge, dissenting:

I respectfully dissent from the majority's conclusion that mailing was unnecessary. From a telephone operator in Wasco, Allen was given Rodriguez's current, Third Street address. Though he attempted personal service unsuccessfully, this did not exhaust the requisites of

diligence. From the process server's return, Allen might reasonably have concluded that George Rodriguez had moved and left no forwarding address with the current Third Street occupant. Yet this did not eliminate the ample possibility that the post office would forward Rodriguez's mail. Because the telephone operator had given the Third Street address as a current listing, Allen should have concluded that any move was recent. Under these circumstances, in my view, Allen could not properly rest on a failed service attempt; due diligence required the additional effort of service by mail to the last known address.

SUPREME COURT
STATE OF ARIZONA

March 1, 1989

RE: DANT OF ARIZONA/RUDY LOPEZ-JUDY LOPEZ
vs. GEORGE RODRIGUEZ
Supreme Court No. CV-89-0028-PR
Court of Appeals No. 1 CA-CV 88-053
Maricopa County No. C-510165

GREETINGS:

The following action was taken by the Supreme Court of the State Of Arizona on February 28, 1989, in regard to the above-referenced cause:

ORDERED: Petition For Review = DENIED.

Vice Chief Justice Feldman did not participate in the determination of this matter.

Record returned to Court of Appeals, Division One, Phoenix, this 1st day of March, 1989.

NOEL K. DESSAINT, Clerk

APPENDIX B

PROOF OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

ATMORE L. BAGGOT, being first duly sworn, upon his oath deposes and says: That he is a member of this Court, a citizen of the United States, and a resident of the county aforesaid; that he is over the age of eighteen years and is not a party to the within above-entitled action; that on the 21st day of April, 1989, he mailed the within Petition for Writ of Certiorari on the parties in said action, by placing a true copy thereof in an envelope, sealed, and postage thereon fully prepaid, in the United States mail at Phoenix, Arizona, addressed as follows:

Mr. Jack D. Klausner, Esq.
Ms. Marigene Dessaint, Esq.
702 East Osborn Rd., Ste. 200
Phoenix, Arizona 85014

Mr. Robert W. Allen, Esq.
20 East Main, Ste. 785
Mesa. Arizona 85201

Atmore L. Baggot

SUBSCRIBED AND SWORN TO before me this 21st day of April, 1989.

My commission expires: 8/25/90

Notary Public

OFFICIAL SEAL
CHERYL M. NELSON
Notary Public Arizona
Principal Offices in
Maricopa County
My Commission Expires Aug. 25, 1990

Supreme Court, U.S.
FILED
MAY 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1729

In The

Supreme Court of the United States

October Term, 1988

GEORGE RODRIGUEZ,

Petitioner,

v.

DANT OF ARIZONA, an Arizona corporation, RUDY LOPEZ and JUDY LOPEZ,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JACK DANIEL KLAUSNER
BURCH & CRACCHIOLO, P.A.
702 E. Osborn Road
Phoenix, Arizona 85014
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Authorities ii

Opinions Below 2

Relevant Statutory Provisions 2

Respondents' Statement of the Case 2

Argument 5

Conclusion 10

Appendix

A. Judgment dated January 29, 1985 ..... A-1

B. Order dated October 29, 1987 ..... B-1

C. Denial of Motion for New Trial dated November 9, 1987 ..... C-1

D. 16 A.R.S. Rules Civ. Proc., Rule 4(e) D-1

TABLE OF AUTHORITIES

Page -

CASES:

Mervyn's, Inc. v. Superior Court, 144 Ariz. 297, 697 P.2d 690 (1985) 6

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652 (1950) 7

Omega II Investment Co. v. McLeod, 153 Ariz. 341, 736 P.2d 824 (Ct. App. 1987) 6

Preston v. Denkins, 94 Ariz. 214, 382 P.2d 686 (1963) 6

Schroeder v. New York City, 371 U.S. 208, 83 S. Ct. 279 (1962) 6

RELEVANT STATUTORY PROVISIONS:

16 A.R.S. Rules Civ. Proc., Rule 4(e) 2, 6, 7, 9

No. 88-1729

In The

Supreme Court of the United States

October Term, 1988

GEORGE RODRIGUEZ,

Petitioner,

v.

DANT OF ARIZONA, an Arizona corporation, RUDY LOPEZ and JUDY LOPEZ,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Dant of Arizona and Rudy and Judy Lopez hereby ask the Court to deny the Petition for a Writ of Certiorari to review the judgment of the Arizona court of appeals. The trial court and the Arizona court of appeals have correctly decided the issues based on the law and the facts of this case; the Arizona supreme court has denied George Rodriguez' Petition for Review of the appellate court decision.

OPINIONS BELOW

On March 29, 1984, respondent Dant of Arizona filed its complaint against George and Maria Macias Rodriguez. Dant was granted a default judgment on its complaint on January 29, 1985. (App. A). On April 30, 1987, Rodriguez filed a Motion to Declare Judgment Void. Following a formal evidentiary hearing, the trial court denied the Rodriguez motion, expressly finding that Dant of Arizona exercised due diligence in attempting to locate Rodriguez prior to resorting to service by publication. (App. B). The trial court subsequently considered and denied the Rodriguez Motion for New Trial. (App. C). The Arizona court of appeals affirmed the trial court decision on December 15, 1988. (App. A to petition). The Arizona supreme court denied the Rodriguez Petition for Review on March 1, 1989. (App. B to petition).

RELEVANT STATUTORY PROVISIONS

16 A.R.S. Rules Civ. Proc., rule 4(e), at Appendix D.

RESPONDENTS' STATEMENT OF THE CASE

George and Maria Macias Rodriguez, (hereinafter "Rodriguez") acquired title to a lot in Glendale, Arizona in 1952. They lived on the property until 1960, in a house which was later condemned and torn down.

In 1968 Maria Macias died and George Rodriguez married his present wife, Luz Marina. Also in 1968, George Rodriguez moved from Glendale, Arizona to

Wasco, California. In 1976, George Rodriguez moved from 1026 Broadway to 2234 Third Street, in Wasco. Until 1987, the records of the Maricopa County Treasurer and the Maricopa County Assessor listed the Rodriguez address as 1026 Broadway, Wasco, California.

Beginning in 1977, Rodriguez defaulted on the tax payments for the vacant lot in Glendale, Arizona. On February 23, 1981, Dant of Arizona (hereinafter "Dant") purchased a Certificate of Purchase for the lot. In 1984, Dant filed legal proceedings to obtain a Treasurer's Deed for the subject lot and to foreclose the Rodriguez interest in the property.

To serve its complaint and summons on Rodriguez, Dant through its attorney, Robin Allen, searched the public records and other sources and eventually located the Third Street address. Dant attempted personal service of its complaint on Rodriguez at that address, however, the deputy sheriff was told by a woman answering the door that Rodriguez had moved. The sheriff notified Dant by affidavit that service had not been accomplished, "Moved. Forwarding address unknown." Unable to personally serve Rodriguez, and after further checks of public records, Dant served notice by publication in June of 1984.

A default hearing was held on January 29, 1985. In that hearing Allen testified to his inability to locate Rodriguez, including the attempted service at the Third Street address by the sheriff. The court entered default judgment for Dant on or about January 29, 1985, finding that Rodriguez was served in the manner and time required by law but had made no appearance. (App. A).

The court ordered title to the subject property to be conveyed to Dant, free and clear of all liens, taxes and claims. Dant paid back taxes on the property for the years 1977, 1978, 1979, 1980 and 1982.

On April 30, 1987, Rodriguez filed a Motion to Declare Judgment Void. Rudy R. and Judy Lopez, bona fide purchasers of the property from Dant, were permitted to intervene in the action. Following a formal evidentiary hearing, which included testimony from George Rodriguez and his present wife, the trial court denied the Rodriguez Motion to Declare Judgment Void. The court found Dant had exercised due diligence in attempting to locate Rodriguez before resorting to service by publication. (App. B).

The trial court subsequently denied a Rodriguez Motion for New Trial. (App. C). The Arizona court of appeals upheld the lower court decision, finding that Dant exercised due diligence in attempting to locate George Rodriguez prior to resorting to service by publication. (App. A to petition). The Arizona supreme court refused to grant Rodriguez' Petition for Review. (App. B to petition).

ARGUMENT

The "Question Presented for Review" of petitioner George Rodriguez is misleading to the court. Rodriguez frames his issue as follows:

> 1. WHETHER SERVICE BY PUBLICATION IS INEFFECTIVE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHERE NOTIFICATION BY MAIL TO A LAST KNOWN ADDRESS IS NOT ATTEMPTED AND IN FACT PLAINTIFF HAS IN ITS POSSESSION A VALID CURRENT ADDRESS AND THE COUNTY RECORDS REVEAL A FORMER ADDRESS AT WHICH DEFENDANT WOULD HAVE RECEIVED CORRESPONDENCE.

The "issue" thus framed ignores pertinent, material facts that were considered by the Arizona courts in reaching a decision in this case. For example, Dant attempted personal service on Rodriguez, but the process server was told at the door of the "last known address" that Rodriguez had moved and there was no known forwarding address. Dant had no way of knowing that it had in its possession a valid current address when the occupant of the house informed the deputy sheriff that Rodriguez had moved.

Furthermore, the Rodriguez address in the Maricopa County assessor records, at which Rodriguez now claims he would have received correspondence, was a house he had moved from eight years earlier. No evidence was presented to the trial court, other than pure speculation, that Rodriguez would have actually received a registered letter sent to him at the old Broadway address. Moreover, service on Maria Macias Rodriguez was absolutely impossible because she had died in 1968.

Respondents are in agreement with the due process cases cited by petitioner, however, as the Arizona courts recognized, application of the principles of due process to the facts of this case show that the due process rights of Rodriguez were not violated by the default judgment granted in January 1985.

In Arizona, service of process on an out-of-state defendant is governed by Ariz. R. Civ. P. 4(e)(2) which provides that service may be made either by registered mail or direct service. Where the defendant is a non-resident of the state whose address is unknown, service of process may be by publication, pursuant to Ariz. R. Civ. P. 4(e)(1) and 4(e)(3). The Arizona courts have consistently held that a finding of "due diligence" prior to service by publication is a jurisdictional requirement. *Preston v. Denkins*, 94 Ariz. 214, 220, 382 P.2d 686, 691 (1963); *Omega II Investment Co. v. McLeod*, 153 Ariz. 341, 736 P.2d 824 (Ct. App. 1987). Where the location of record owners of property is readily available, the courts have uniformly held that the trial court lacked jurisdiction where service was by publication. *Id.* at 342, 736 P.2d at 825.

Where the address or whereabouts of the person interested in the proceeding can be discovered by obvious and simple means, service by publication is invalid. *Mervyn's, Inc. v. Superior Court*, 144 Ariz. 297, 300, 697 P.2d 690, 693, n. 4. (1985). Arizona is in accord with decisions of the United States Supreme Court holding that notice by publication is insufficient with respect to a person whose name and address are known or easily ascertainable. *See e.g., Schroeder v. New York City*, 371 U.S.

208, 83 S. Ct. 279 (1962); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652 (1950).

Pursuant to law, Dant attempted the type of service most likely to provide actual notice, personal service. Dant's efforts to locate Rodriguez were actually successful but the process server was told that Rodriguez no longer lived at that address. Lacking a valid address, Dant served notice by publication as permitted by Ariz. R. Civ. P. 4(e).

The trial and appellate courts found Dant exercised due diligence in attempting to locate Rodriguez prior to service by publication where Dant's efforts were as follows:

1. Attorney Robin Allen searched the records at the Maricopa County treasurer's office and the Maricopa County assessor's office. He located the Broadway address in Wasco, California;

2. He contacted the information operator in Wasco to verify that Rodriguez was living at the Broadway address. The operator told Allen that Rodriguez was at 2234 Third Street, in Wasco.

3. He sent the summons and complaint to the Kern County sheriff, requesting personal service at the Third Street address;

4. He was notified by affidavit of deputy sheriff Sgt. Chris Hill that Hill was unable to serve Rodriguez at 2234 Third Street or anywhere within the judicial district, because they had moved, "forwarding address unknown."

5. He then checked local telephone books and the records of the Motor Vehicle Department in Maricopa County, to determine if Rodriguez had returned to Arizona.

6. Unsuccessful in locating Rodriguez, he served notice of the complaint by publication in *The Record Reporter*.

The Kern County deputy sheriff, Sgt. Chris Hill, who attempted service on Rodriguez at the Third Street address, testified at his deposition that the woman answering the door informed him Rodriguez had moved and left no forwarding address. Although petitioner raises a question in his brief about whether there could have been some confusion between George Rodriguez and his son George, the current Mrs. Rodriguez testified to the contrary at the evidentiary hearing. Mrs. Rodriguez said she was the only person who would have answered the door, and she would not have been confused about whether the person at the door was asking for the father or son.

No one knows for sure why personal service was not possible on Rodriguez, but a likely explanation is that Rodriguez was avoiding the service he now complains he did not get. Rodriguez argues that service by registered mail should have been attempted after the failed attempt at personal service. He ignores the fact that Dant did not have a known address after it was informed that Rodriguez had moved from Third Street. Furthermore, a letter sent by registered mail requires the signature of the addressee. If the addressee is not home, he is notified to go to the post office to pick up his mail. If that does not occur, and a second delivery attempt is unsuccessful, the letter is returned as undelivered.

Whether or not Rodriguez would have picked up his registered letter or continued to avoid service is pure speculation. Mailing an un-registered letter to Rodriguez would not have complied with the requirements of Ariz. R. Civ. P. 4(e)(2), and would have left Dant open to claims that it had never effected service on Rodriguez.

Petitioner's argument that the summons and complaint should have been mailed to the old Broadway address because the tenant there would have given it to him, is similarly flawed. George Rodriguez had not lived at that address for eight years. Mailing the papers to the old address would have indisputably failed to comply with Ariz. R. Civ. P. 4(e)(2). Moreover, petitioner offers the court only speculation, not evidence, in his claim that George Rodriguez would have been notified of the mail by a tenant.

The Arizona court of appeals, in reviewing the facts and issues of this case, stated there is no formula or checklist that constitutes due diligence, and Dant "was not required to do 'extensive detective work into the whereabouts of strangers.' " The court concluded as follows:

> We conclude that Dant exercised due diligence in attempting direct service: Allen found Rodriguez's Third Street address by reviewing telephone directories, Department of Motor Vehicle records, and County Treasurer's and Assessor's records and by speaking to a telephone operator in Wasco, California; and Allen attempted direct service at that address.

(Arizona Court of Appeals Memorandum Decision, petitioner's App. A-10).

CONCLUSION

The Petition for Writ of Certiorari to review the judgment of the Arizona court of appeals should be denied. The court of appeals, in affirming the trial court decision, correctly held that the due process rights of petitioner Rodriguez were not violated where respondent exercised due diligence in attempting to locate Rodriguez before resorting to service by publication.

Respectfully Submitted,

JACK DANIEL KLAUSNER
BURCH & CRACCHIOLO, P.A.
702 E. Osborn Road
Phoenix, Arizona 85014
(602) 234-9927
Attorneys for Respondents

APPENDIX A

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

DANT OF ARIZONA, an Arizona partnership, Plaintiff, vs. GEORGE RODRIGUEZ, and MARIA MACIAS RODRIGUEZ, husband and wife; GLENN STAPLEY, Maricopa County Treasurer; JOHN DOES I-V and JANE DOES I-V; ABC CORPORATIONS; and THE UNKNOWN HEIRS OF ANY OF THE ABOVE NAMED DEFENDANTS, IF DECEASED, Defendants.	NO. C 510165 JUDGMENT

This cause having come on regularly for hearing on the 29th day of January, 1985, the plaintiff being represented by counsel, ROBIN W. ALLEN, and the defendants neither being present personally, nor represented by counsel, and the Court having received the sworn testimony of counsel for the plaintiff, and evidence in support of the allegations of the Complaint herein,

IT APPEARING to the Court that the above named defendants were served in the manner and for the time required by law, and that GEORGE RODRIGUEZ and MARIA MACIAS RODRIGUEZ have made no appearance herein and the default of said defendants having been regularly and duly entered and the plaintiff having

presented evidence in support of the allegations of the Complaint,

IT IS THE FINDING OF THE COURT that the material allegations of the plaintiff's Complaint are true, and the relief prayed for by plaintiff should be granted, and

THE COURT FURTHER FINDS that on or about the 23rd day of February, 1981, the following described parcel of real property located in Maricopa County, Arizona, to wit:

> Lot 18, LA CASITA MIA, according to the plat of record in the office of the Maricopa County Recorder in Book 47 of Maps, page 21.

was legally and regularly sold by the Maricopa County Treasurer for delinquent taxes, which had been levied and assessed against said parcel of real property, and Certificate of Purchase No. 79004184 on parcel number 146-7-18 being regularly and legally issued therefor; that by regular and lawful sale and assignment, and for due consideration, the plaintiff became the owner of all right, title and interest of the County of Maricopa, State of Arizona, in and to said parcel of real property; that said parcel of real property has not been redeemed, nor has tender of money been made for said redemption; and that a period of more than three (3) years has elapsed since the described real property was sold for delinquent taxes.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have judgment against the defendants, GEORGE RODRIGUEZ and MARIA MACIAS RODRIGUEZ, as follows:

1. That, pursuant to A.R.S., Section 42-452, a Treasurer's Deed be executed to the plaintiff as holder and

purchaser of Maricopa County Treasurer's Certificate of Purchase on the aforementioned and described real property, conveying to plaintiff said real property, free and clear of all liens, taxes and claims, except any unpaid real property taxes duly assessed and which may still be owing.

2. That the defendants above referenced, and all of them, and all persons claiming any interest in the aforementioned real property subsequent to the time Lis Pendens Notice was filed with the said Maricopa County Recorder, be and they are hereby forever foreclosed of all right, title, interest and equity of redemption in and to the foregoing premises, and that plaintiff is the owner of the said real property in fee simple, free and clear of all claims and liens, except taxes duly assessed as set forth above and any public easements and rights of way.

3. The Court expressly finds and determines that there is no just reason for delay in entering final judgment and expressly directs that this judgment be entered forthwith.

DONE IN OPEN COURT this date: *January 29, 1985.*

/s/ William Topf
Superior Court Commissioner

APPENDIX B

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

DANT OF ARIZONA, Plaintiff, vs. GEORGE RODRIGUEZ, et ux., et al., Defendant.	)	NO. C-510165 ORDER

This matter having come on regularly for evidentiary hearing on August 7, 1987, on defendants Rodriguez' Motion to Declare Judgement Void. Plaintiff represented by counsel, Robin W. Allen. Defendants Rogriguez are present with counsel, Atmore Baggot and Spanish interpreter, Luz Fuenzalida. Intervenors Rudy R. Lopez and Judy C. Lopez are not present, but are represented by counsel, Marigene Dessaint.

Defendants George Rodriguez and Luz Marina Rodriguez are sworn and both testify. Exhibits 1 through 31 were all marked and received into evidence, including the deposition of Kern County Deputy Sheriff, Chris Edward Hill, dated July 6, 1987, and the deposition of Robin W. Allen, dated June 3, 1987. Closing arguments were presented by all counsel of the parties and intervenors. The matter was taken under advisement.

This matter has been under advisement. The Court has considered all memoranda submitted, all evidence

presented at the evidentiary hearing, and the arguments of Counsel.

THE COURT FINDS and ORDERS as follows:

1. On January 29, 1985, judgment was entered against Defendants Rodriguez based on service by publication. At the default hearing on that date, Commissioner Topf entered default judgement after hearing evidence of Plaintiff's efforts to use due dilligence and to locate Plaintiffs for personal service.

2. Plaintiff's counsel attempted to locate Defendants Rodriguez by reviewing records of Maricopa County Treasurer's and Assessor's Offices. Counsel hired the Kern County, California's Sheriff's Office to serve Defendants personally with a Summons and Complaint. The Sheriff's Office attempted to serve Defendants at 2234 Third Street, Wasco, California, or anywhere within the Judicial District. Plaintiff's Counsel was notified that the attempted service was unsuccessful and the Summons and complaint were returned with the indication that Defendants Rodriguez had moved, their forwarding address unknown. Plaintiff's attorney then checked the Motor Vehicle Department records in Maricopa County and local phone directories unsuccessfully.

3. The Court finds that Plaintiff's Counsel's efforts to locate Defendants Rodriguez were reasonable and all support a finding that due dilligence was exercised in attempting to locate Defendants Rodriguez before serving them by publication.

THEREFORE, IT IS ORDERED denying Defendants Rodriguez' Motion to Declare Judgement Void.

DONE IN OPEN COURT, this date: *October 29, 1987* .

/s/ Ruth H. Hilliard
Ruth H. Hilliard
Superior Court Judge

Copy of the foregoing mailed
this date 10/7/87 to:

Atmore Baggot
Casablanca Corporate Center
4323 N. 12th Street, Ste. 104
Phoenix, Arizona 85014
Attorney for Defendant

Miss Marigene Dessaint
Burch & Cracchiolo
702 E. Osborn Road
Phoenix, AZ 85014

Mr. Rodrick D. MacMillan
Deputy County Attorney
201 W. Jefferson, 7th Floor
Phoenix, AZ 85003
Attorney for Maricopa County

By /s/ RWL

APPENDIX C

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

CC13-44310
Code

11-9-87
Date

HON. RUTH H. HILLIARD
Judge or commissioner

P. Cook
Deputy

No. *C 510165*

DANT OF ARIZONA

v.

GEORGE RODRIGUEZ, et ux.; et al.

Robin W. Allen
(Mesa)

Atmore Baggot

Marigene Dessaint

County Attorney
By: Rodrick D. MacMillan

The Court has considered Defendants Rodriguez' Motion for New Trial, as well as the Responses filed.

THE COURT FINDS that Plaintiff exercised due diligence and that Rule 4(c)(3), A.R.C.P., was not violated in light of all the efforts made by Plaintiff's Counsel.

IT IS ORDERED denying Defendants Rodriguez' Motion for New Trial.

APPENDIX D

16 A.R.S., Ariz. R. Civ. P., rule 4(e):

4(e)(1) Summons; Alternative Methods of Service. When a defendant is a non-resident of the state, or is absent from the state, or is a transient person, or is one whose residence is unknown to the party, or is a corporation incorporated under the laws of any other state or foreign country which has no legally appointed and constituted agent in this state, or is attempting to avoid service of summons, a summons shall be issued as in other cases and service may be made in accordance with Sections 4(e)(2) or 4(e)(3) of this Rule. The methods of service herein provided shall be applicable for the assertion of any claim by way of a cross-claim, third party claim or other appropriate pleading against any party who has not appeared in the action and shall be in addition to and not exclusive of any other means of service which may be provided by statute or rule.

(2) Summons; Personal Service Out of State. When the defendant is a resident of this state, or is a corporation doing business in this state, or is a person, partnership, corporation or unincorporated association subject to suit in a common name which has caused an event to occur in this state out of which the claim which is the subject of the complaint arose, service may be made as herein provided, and when so made shall be of the same effect as personal service within the state. In case of a corporation or partnership or unincorporated association, service

under this Rule shall be made on one of the persons specified in Section 4(d)(6).

(a) Registered Mail. When the whereabouts of a defendant outside the state is known, the serving party may deposit a copy of the summons and complaint in the post office, registering it with a return receipt requested. Upon return through the post office of the registry receipt, the serving party shall file an affidavit with the court showing the circumstances warranting the utilization of the procedure authorized under Section 4(e)(1); and (a) that a copy of the summons and complaint was dispatched to the party being served; (b) that it was in fact received by the party as evidenced by the attached registry receipt; (c) that the genuine receipt thereof is attached; and (d) the date of the return thereof to the sender. This affidavit shall be prima facia evidence of personal service of the summons and complaint and service shall be deemed complete and time shall begin to run for the purposes of Section 4(e)(4) of this Rule thirty (30) days after the filing of the affidavit and receipt.

(b) Direct service. Service out of the state may also be made in the same manner provided in Section 4(d) of this Rule by a person authorized to serve process under the law of the state where such service is made. Service shall be complete when made and time for purposes of Rule 4(e)(4) shall begin to run at that time, provided that before any default may be had on such service, there shall be filed an affidavit of service showing the circumstances warranting the utilization of the procedure under Section 4(e)(1) and

attaching an affidavit of the process server showing the fact of the service.

(3) Summons; Service by Publication. Where by law personal service is not required, and a person is subject to service under Section 4(e)(1), such Service may be made by either of the methods set forth in Section 4(e)(2) or by publication. Service by publication shall be made by publication of the summons in a newspaper published in the county where the action is pending, and if no newspaper is published in such county, then in a newspaper published in an adjoining county, at least once a week for four successive weeks and the service shall be complete thirty days after the first publication. When the residence of the defendant is known, the party shall on or before the date of the first publication mail a copy of the summons and complaint, postage prepaid, directed to the defendant at the defendant's place of abode. The plaintiff shall file an affidavit showing the publication and mailing and the circumstances warranting the utilization of the procedure under Section 4(e)(1) which shall be prima facie evidence of compliance herewith, and if the residence is unknown, the affidavit shall so state.

* * *